United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 16, 2008

TO : Richard L. Ahearn, Regional Director

Region 19

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Concessions International, LLC

and UNITE HERE! Local 8 584-5000 Cases 19-CE-110 and 19-CE-111 584-5014 584-5042 584-5056

The Region submitted these cases for advice on whether Concessions International, LLC (CI) and UNITE HERE! Local 8 (the Union) violated Section 8(e) by including a clause in their collective bargaining agreement that restricts CI's ability to subcontract unit work. We conclude that the clause is a primary work preservation clause and therefore does not violate the Act.

FACTS

CI leases space in the Seattle-Tacoma International Airport, owned by the Port of Seattle (the Port), where CI provides food and beverage services. CI's lease with the Port states the Port may require CI to sublease to an Airport Concession Disadvantaged Business Enterprise (DBE). A DBE is a concession whose owners are at least 51 percent socially and economically disadvantaged and "[w]hose management and daily business operations are controlled by" the disadvantaged owners. 1

CI currently operates three coffee shops and one fast food restaurant at the airport. It previously operated two Burger King franchises and an ice cream shop; CI has entered into subcontracts under which the Charging Parties, CVC Foods and Filo Foods, have taken over these operations. Filo Foods is a certified DBE; as of February 2008, CVC was not but was attempting to become certified.

CI's Relationship With the Union

CI has a collective bargaining agreement with the Union. Section 2.01 of the agreement sets forth the goal

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¹ 49 CFR § 23.3.

of protecting unit work and requires CI to maintain "full control" over subcontracted work:

It is recognized that the Employer [CI] and the Union have a common interest in protecting work opportunities for all employees covered by this Agreement and employed on a regular basis. Therefore, no work customarily performed by employees covered by this Agreement shall be performed under any sublease, subcontract, or other agreement unless the terms of any lease, contract, or other agreement specifically state that (a) all such work shall be performed only by members of the bargaining unit covered by this Agreement and (b) the Employer [CI] shall at all times hold and exercise full control of the terms and conditions of employment of all such employees pursuant to the terms of this Agreement.

There is conflicting evidence on what the parties said during negotiations over section 2.01, which occurred before CI entered into subcontracts with CVC and Filo Foods. CI claims it told the Union that DBEs have been reluctant to sublease from CI because of section 2.01. According to CI's bargaining notes, the Union responded that the contract was "not binding on [a] sub" but also stated that "[p]rime has to make DBE comply." A CI witness testified that the Union "wanted to make it clear that they did not want to gain work, but they wanted to make sure they did not lose any work." The Union denies that CI said section 2.01 was making subcontracting with a DBE difficult.

CI's Subcontract With CVC Foods

On August 1, 2006, CI subcontracted operation of its Sea-Tac Burger King franchises to CVC. Despite the language in section 2.01 requiring CI to exercise "full control over the terms and conditions of employment," the CI/CVC subcontract contains a provision requiring CVC to exercise "full control" over terms and conditions of employment:

Labor Agreement. Sublessee acknowledges and agrees that all work customarily performed by employees covered by the Collective Bargaining Agreement between Lessee and Hotel Employees and Restaurant Employees Local No. 8 shall be performed only by members of such bargaining unit and Sublessee shall at all times hold and exercise full control of the terms and conditions of employment of all such employees pursuant to the terms of such Collective Bargaining Agreement. Lessee

has provided Sublessee with a copy of the current Collective Bargaining Agreement.

(emphasis added). CI gave a copy of the CBA to CVC and indicated CVC was expected to comply with it. CVC has complied with the CBA based on its belief that it is a Burns² successor. There is no evidence that CI or CVC gave the Union a copy of the subcontract or otherwise informed the Union that, contrary to its obligations under section 2.01, CI had contracted away control over the terms and conditions of employment for the Burger King employees.

CVC hired all former CI employees and began operating the two Burger King restaurants on September 21, 2006. At a meeting with the Burger King employees, CVC's owner explained that the employees would now work for CVC, not CI, but that CVC would maintain the status quo as to wages and terms of employment. CVC told employees that it "would honor everything they had, that they would not lose anything by coming to work for him (benefits, vacation, seniority, wage rates, and so on). . . [CVC] assured the employees that everything would stay the same." No Union representatives were present at this meeting.

CI told CVC that it would have to submit paperwork to the Union each month, including a roster of employees and benefit-related paperwork. Sometime in September 2006, CVC contacted the Union to ask about remitting employees' dues to the Union. CVC met with several Union representatives to discuss dues collection and fund contributions. The parties did not discuss CVC's relationship with CI. After the meeting, on September 28, 2006, the Union sent CVC a letter detailing the dues and initiation fees.

In October 2006, the Union drafted a "Letter of Understanding" at the request of CI and CVC. The Letter sets forth section 2.01 in full and provides that the Union will treat CI and CVC separately for dues and fund contribution purposes:

The Employer [CVC] is a subcontractor with CI, in accordance with the terms outlined in [section 2.01]. The Employer [CVC] and CI have requested as a courtesy, and the Union has agreed, to separate the Employer's [CVC's] workforce from CI so as to

² NLRB v. Burns International Security Services, 406 U.S. 272 (1972) (stating that a successor employer has a duty to recognize and bargain with an incumbent union where the there is continuity of enterprise and continuity of work force).

facilitate the billing process for dues payments, and for billings to the Pension and Health Trusts.

CI and CVC told the Union that this would make bookkeeping easier for CVC. The Union believed CVC was performing administrative duties on behalf of CI. Because it would be confusing to refer to both parties as "the Employer," the Union randomly chose to identify one by name (CI) and the other as "the Employer" (CVC).

After the Letter of Understanding was signed, the Union dues office entered CVC into its computer database. The Union subsequently sent form letters to all of the companies in its database, including CVC, containing information about dues and health and welfare funds. example, on October 2, 2007, a form letter was sent to CVC addressed to "General Manager." The letter indicates employees are required to join the union within 31 days of employment. The letter also quotes contract language. other letters informed CVC of an increase in a strike fund assessment and a decrease in dues for part time workers. The Union claims these form letters were erroneously sent to CVC and points out that CVC has no contract with the Union. The only reason CVC received this and similar form letters is because CVC was entered into the Union's database due to the Letter of Understanding.

Between September 2007 and January 2008, the Union filed several grievances related to the terms and conditions of employment of the Burger King employees. The Union filed these grievances against CI but also sent copies to CVC. After receiving the grievances, CI's attorney sent a letter to CVC's attorney stating that CVC is required under its subcontract to defend CI against any claims and indemnify CI for any costs associated with the grievances. On January 28, 2008, CI notified the Union for the first time that the Burger King employees work for CVC, not CI.

On February 7, 2008, the Union filed a grievance with CI alleging that CI breached section 2.01 by permitting work customarily performed by unit employees to be done by persons who are not in the unit, and by contracting away control over the terms and conditions of the persons doing that work. The Union expressly stated that it is not asking CI to stop doing business with CVC or Filo Foods:

Remedy: The remedy requested is (1) an order requiring CI to, in the future, ensure that work customarily performed by employees covered under the Agreement is performed only by members of the bargaining unit covered by the Agreement, and to at

all times hold and exercise full control of the terms and conditions of employment of the people performing the work, and (2) a "make whole" remedy, such that the Union and its represented employees will be made whole for all wages, benefits and other things of economic value lost as a result of the contract violation alleged herein. Expressly excluded from the remedy requested is any request that CI cease or refrain or agree to cease or refrain from doing business with any other entity. Also expressly excluded from the remedy requested is any request that CI require any other employer to recognize or bargain with the Union as the representative of its employees.

The Union subsequently sent a letter to CVC acknowledging that CVC is not bound to comply with the CBA and stating, "With respect to pending grievances between the Union and CI, the Union seeks recovery at this point only from CI." CI has refused to arbitrate over any of the Union's grievances, and the Union has filed suit in U.S. District Court to compel arbitration.

CI's Subcontract With Filo Foods

Filo Foods LLC is a certified DBE. On June 21, 2007, CI and Filo Foods entered into a subcontract for Filo Foods to take over the space in which CI had been operating an ice cream shop. The Filo Foods subcontract contains the same "Labor Agreement" provisions as the CVC subcontract and requires that work be performed by CI unit employees and that Filo Foods exercise full control over terms and conditions of employment.

The owner of Filo Foods was never given a copy of CI's union contract. She has had no direct contact with the Union about the work being performed under her CI subcontract. Despite the subcontract provision requiring Filo to use unit employees, CI never told Filo that it had to sign a union contract, use union labor, or pay certain wages or benefits.

In November 2007, Filo Foods took over the ice cream shop CI had been operating, and CI transferred its employees from the ice cream shop to its other operations. Filo Foods used its own employees at the ice cream shop, which it planned to operate until February 2008. At that point, Filo Foods intended to begin converting the space for use as a restaurant called Big Foot.

ACTION

The Region should dismiss the charges, absent withdrawal. Section 2.01 is a lawful work preservation clause on its face, and CI's unilateral attempts to force CVC and Filo Foods to comply with the collective bargaining agreement do not constitute "enter[ing] into" an agreement under Section 8(e).

8(e) Principles

Section 8(e) makes it an unfair labor practice for a union and an employer to agree that the employer will cease doing business with another person or employer. Despite 8(e)'s broad language, the Board has ruled that work preservation clauses are lawful even though they have an incidental effect of limiting those with whom the signatory employer may do business. The Supreme Court held in NLRB v. International Longshoremen's Association (ILA I) that a work preservation agreement is lawful if it meets two requirements: (1) the agreement must have as its objective the preservation of work traditionally performed by employees in the unit; and (2) the contracting employer must have the power to assign the work in question (the right of control test).

To be lawful, the objective of the agreement must be the preservation of unit work and address the labor relations of the contracting employer with his own employees. 5 An agreement violates Section 8(e) if it is instead aimed at satisfying union objectives beyond the primary workplace. 6

An employer has the right to control work where "it possesse[s] the authority to assign the [work] in question as it s[ees] fit." An employer cannot divest itself of control over work by taking an "active role in seeking" a "subcontract which it kn[ows] would cause it to breach its

³ Associated General Contractors, 280 NLRB 698, 701 (1986).

 $^{^4}$ NLRB v. Longshoremen ILA, 447 U.S. 490, 504 (1980).

⁵ National Woodwork v. NLRB, 386 U.S. 612, 644-45 (1967).

⁶ <u>Id.</u> at 645.

 $^{^{7}}$ Plumbers & Steamfitters Local 342 (Conduit Fabricators), 225 NLRB 1364, 1364 (1976).

collective-bargaining contract."⁸ In such cases, the decision to subcontract the work is "a direct reflection of [the employer's] right to control this work."⁹

In determining whether an agreement violates Section 8 (e), the Board first considers whether the language of the clause is clear. If so, the Board will determine whether it is facially valid under 8 (e). "[W] here the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law."10 "[A]n unlawful construction will not be presumed."11 Only if the contract is ambiguous will the Board "consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner."12 Where the contract is lawful, one party's later attempt to interpret the clause as if it were a hot cargo provision does not constitute a violation of Section 8 (e).13

Section 2.01 Is Clear and Facially Lawful

The express purpose of section 2.01 is to protect work opportunities of unit employees and prohibit subcontracting of "work customarily performed by employees covered by this Agreement" unless certain conditions are met. One of those conditions is that the subcontracted work will continue to "be performed only by members of the bargaining unit." Section 2.01 explicitly and unambiguously applies only to work traditionally performed by members of the bargaining unit, and it ensures that work done by members of the bargaining unit will continue to be done by members of the bargaining unit. The provision facially satisfies the

⁸ Painters District Council No. 20 (Uni-Coat), 185 NLRB 930, 932 (1970).

⁹ Conduit Fabricators, 225 NLRB at 1364.

¹⁰ General Teamsters, Local 982 (J.K. Barker Trucking Co.),
181 NLRB 515, 517 (1970), enforced 450 F.2d 1322 (D.C. Cir.
1971).

 $^{^{11}}$ Steelworkers Local 4800 (George E. Failing Co.), 329 NLRB 145, 147 (1999).

 $^{^{12}}$ Id. at n.10.

¹³ Longshoremen ILWU Local 13 (Egg City), 295 NLRB 704, 705 (1989) (holding that parties to a contract that on its face does not violate 8(e) do not "enter into an agreement" by submitting a dispute over the contract to arbitration).

first requirement of ILA $\scriptstyle\rm I$ by having a valid work preservation object. 14

Regarding the second requirement, the "right of control" test, section 2.01 explicitly and unambiguously requires CI to exercise the requisite degree of control. It permits CI to subcontract out bargaining unit work so long as CI "at all times hold[s] and exercise[s] full control of the terms and conditions of employment of all such employees pursuant to the terms of this Agreement." The clause is facially clear: If CI contracts out bargaining unit work, CI must maintain the right to control that work. Under the unambiguous terms of the contract, CI has "the power to give the employees the work in question" as required by ILA I. 16

Because section 2.01 is unambiguous and facially valid, the charges should be dismissed. Consideration of extrinsic evidence is unnecessary. 17

Extrinsic Evidence

Even if it were necessary to consider extrinsic evidence, no evidence supports CI's claim that the parties agreed to apply section 2.01 in an illegal manner.

First, CI's claim that bargaining history shows an unlawful motive is unsupported. CI's own witness testified that, during negotiations over section 2.01, the Union "wanted to make it clear that they did not want to gain

¹⁴ See Teamsters (Active Transportation Co.), 335 NLRB 830, 833 (2001) (finding contract "expressly pertains only to . . . work of the type performed by bargaining unit employees under the collective-bargaining agreement"); see also Local Joint Executive Board (Sy Redd), 31-CE-176, Advice Memorandum dated May 27, 1982 (dismissing 8(e) charge over identical language).

¹⁵ See <u>Sy Redd</u>, 31-CE-176, Advice Memorandum dated May 27, 1982 (finding identical contract language satisfied right of control test).

 $^{^{16}}$ <u>ILA I</u>, 447 U.S. at 504.

¹⁷ See George E. Failing Co., 329 NLRB at n.10; see also Active Transportation Co., 335 NLRB at 833 ("[W]e find it unnecessary to determine in this case whether Active in fact controls Safety Carrier. . . . [W]e find that the meaning of the Agreement is clear on its face and that it involves only work under Active's control.").

work, but they wanted to make sure they did not lose any work." CI's bargaining notes further indicate that the "Union contract [would] not apply to subtenants and DBE's [sic]." Although CI has one note stating the Union wanted CI to "make the DBE comply," none of the parties have been able to explain what this note means, and we therefore attach little significance to it. None of the evidence regarding bargaining suggests the parties agreed to apply section 2.01 in an unlawful manner.

Second, the parties' subsequent conduct does not suggest that they agreed to apply section 2.01 in an unlawful manner. While CI's subcontracts with CVC and Filo Foods appear to require the Charging Parties to comply with the collective bargaining agreement, there is no evidence that CI imposed such a requirement at the Union's urging. CI's unilateral actions do not violate Section 8(e), which prohibits only contracts or agreements. 18 CI's unilateral attempts to require the Charging Parties to comply with the collective bargaining agreement do not violate Section 8(e).

CI points to several letters the Union sent to CVC, reminding CVC of its obligations under its collective bargaining agreement, as evidence that the Union was attempting to force CVC to comply with the collective bargaining agreement. But these were form letters sent to CVC, along with everyone else in the Union's employer database, only because CI and CVC asked the Union to treat the Burger King franchises separately for administrative purposes. The Union entered CVC into its employer database pursuant to a Letter of Understanding that specifically stated CVC was a subcontractor "in accordance with the terms" of section 2.01. Neither CI nor CVC told the Union that CI had breached its obligations under section 2.01. Given that the Union believed the Burger King employees were unit members and that CI had full control over them, as required by section 2.01, the form letters do not support CI's claim.

¹⁸ See Egg City, 295 NLRB at 705 (finding no violation of Section 8(e) where one party attempted to enforce an unambiguous and facially lawful agreement in an unlawful manner); Sheet Metal Workers Local 27, 321 NLRB 540, 540 fn.3 (1996) (holding that "solely unilateral conduct by a union, for example, a threat of picketing or the mere filing of a grievance, to enforce an unlawful interpretation of a facially lawful contract clause does not violate Sec. 8(e) because such conduct does not constitute an 'agreement'").

The Charging Parties also contend that CI does not have the right to control the work of the Charging Parties' employees, making section 2.01 an illegal secondary agreement. However, section 2.01 on its face requires CI to maintain control over the workforce. It was only after CI breached section 2.01 that CI lost the right to control. An employer cannot divest itself of control over work by taking an "active role in seeking" a "subcontract which it kn[ows] would cause it to breach its collective-bargaining contract." Moreover, the fact that CI has breached section 2.01 is not evidence that the parties agreed that section 2.01 would be applied in an illegal manner.

We note that because CVC is now indisputably the sole employer of the CVC employees, CI and the Union might well violate Section 8(e) if they continued to enforce the section 2.01 provision requiring unit employees to perform work subcontracted to CVC. But no evidence indicates that CI and the Union have agreed to enforce this portion of section 2.01 now that CI has given up control over who performs that work. Although CVC hired former unit employees, perhaps believing that this satisfied its subcontract with CI, there is no evidence that CI and the Union agreed to require CVC to do so. And Filo Foods has used its own employees with no protest from CI or the Union.

CI also argues that the Union's numerous grievances over the Burger King employees' employment conditions, and the ensuing lawsuit seeking to compel arbitration resulting from CI's refusal to arbitrate, show that the Union intended section 2.01 to require subcontractors to comply with the collective bargaining agreement. But the Union filed these grievances against CI, not CVC. The Union acted consistent with its belief that CI controlled the Burger King employees' terms and conditions of employment, as required by section 2.01. Once CI notified the Union that it no longer had control over the Burger King employees, the Union sent CVC a letter indicating it does not expect CVC to comply with the CBA. Given these facts, the Union's grievances and subsequent lawsuit to compel arbitration do not demonstrate an intent to interpret section 2.01 in a secondary manner.

We note that the filing of grievances can, under certain circumstances, constitute a violation of Section 8(b)(4) if the object is to force an employer to comply

 $^{^{19}}$ Uni-Coat, 185 NLRB at 932.

with an agreement prohibited by Section $8(e).^{20}$ The Union has filed a grievance against CI for breach of section 2.01, but the grievance specifically states the Union is not asking CI to stop doing business with other entity. The limitations on the remedy sought ensures that the grievance is primary, and it therefore does not violate Section $8(b)(4).^{21}$

Finally, CI claims the parties could not have intended section 2.01 to require it to maintain control of the Burger King employees because CVC would not qualify as a DBE in such circumstances. The Union, however, denies knowing of CI's DBE obligations. In any case, the Supreme Court has ruled that "however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective." That section 2.01's requirement that CI control terms and conditions of employment could impact its ability to do business with DBEs does not make section 2.01 a secondary agreement.

Accordingly, the Region should dismiss the charges, absent withdrawal.

B.J.K.

Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988) (holding that union violated Section 8(b)(4)(ii)(A) by filing a grievance arguing for illegal interpretation of contract).

²¹ See George Day Const. Co., Inc. v. United Brotherhood of Carpenters, 722 F.2d 1471 (9th Cir. 1984) (enforcing arbitrator's award of backpay and an injunction for employer's violation of work preservation clause).

²² National Woodwork, 386 U.S. at 627.